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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000807-MR
AND
NO. 2008-CA-000948-MR

COMMONWEALTH OF KENTUCKY APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, SPECIAL SENIOR JUDGE
ACTION NO. 02-CR-00949

JAMES EVERETT GOWANS APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

VANMETER, JUDGE: The Commonwealth of Kentucky appeals, and James Everett Gowans cross-appeals from the March 31, 2008, order of the Fayette

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Circuit Court ruling on his RCr[2] 11.42 claim. That order held that Gowans had not received ineffective assistance of counsel during the guilt phase of his trial for murder, but that during the penalty phase his counsel had been legally ineffective. Upon review, we affirm the trial court's order with respect to the guilt phase of the trial, but vacate the trial court's order insofar as it determined counsel was ineffective during the penalty phase.

I. Factual Background

On June 29, 2002, Gowans was with his wife at the Rainbow Tavern in Lexington, Kentucky. Gowans was armed with a handgun. Paul Payne, with whom Gowans had a history of discord, was also present at the bar. Gowans claimed that upon exiting the restroom, Payne started shouting at him and moved toward him in a threatening manner. Gowans pulled his handgun from his back pocket and fired twice, mortally wounding Payne.

Gowans was indicted and charged with one count of murder. At trial, a jury found him guilty of the lesser offense of first-degree manslaughter. Consistent with the recommendation of the jury, the trial court sentenced Gowans to twenty years in prison.[3]

Gowans' direct appeal to the Supreme Court of Kentucky was affirmed.[4] Thereafter, Gowans filed a *pro se* RCr 11.42 motion to vacate, set aside,

[2] Kentucky Rules of Criminal Procedure.

[3] The penalty range for first-degree manslaughter, a class B felony, is ten to twenty years. KRS 532.060(2)(b).

[4] *Gowans v. Commonwealth*, 2005 WL 2316194 (Ky. 2005) (2003-SC-0401-MR).

or correct his sentence. In his motion, Gowans alleged ineffective assistance of trial counsel and argued that his attorney had made the following errors: 1) failure to present an intoxication defense; 2) failure to investigate and present mitigating evidence during the penalty phase of trial; 3) failure to strike a biased juror; and 4) failure to locate a corroborating witness. Counsel for Gowans filed a supplement to the RCr 11.42 motion, and raised two additional claims of error of trial counsel: 1) failure to object timely to the trial court's jury instructions; and 2) cumulative error. In response, the trial court entered an order finding that on the guilt phase issues, the record refuted all claims of ineffective assistance of trial counsel and that an evidentiary hearing was not necessary. The trial court concluded that none of the errors, individually or cumulatively, revealed deficient performance of trial counsel and that no reasonable probability existed that the outcome of the guilt phase of Gowans' trial would have been different but for the alleged deficient performance. The court, however, concluded that the record was insufficient to determine whether trial counsel had investigated and interviewed mitigation witnesses for the penalty phase, and it set an evidentiary hearing for that issue only.

Following the hearing, the trial court entered an order finding that although trial counsel was not ineffective during the guilt phase of trial, a reasonable probability existed that the result of the penalty phase would have been different if trial counsel had presented mitigation evidence. The trial court

therefore vacated Gowans' sentence and ordered a new sentencing hearing. This appeal and cross-appeal followed.

II. Standard of Review

To establish a claim for ineffective assistance of counsel, a defendant must show that: 1) counsel's performance was deficient, and 2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *accord Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [.]" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. The defendant bears the burden in such claims and he must show that his counsel's representation fell below an objective standard of reasonableness. In so doing, a defendant must overcome a strong presumption that counsel's performance met the required minimum standard. *Pelfrey v. Commonwealth*, 998 S.W.2d 460, 463 (Ky. 1999); *Jordan v. Commonwealth*, 445 S.W.2d 878, 879 (Ky. 1969); *McKinney v. Commonwealth*, 445 S.W.2d 874, 878 (Ky. 1969). To show prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is that which is sufficient to undermine the confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. The defendant must prove more than that counsel's error had some conceivable effect on the outcome of the proceeding. *Id.*; *Sanders v. Commonwealth*, 89 S.W.3d 380, 386 (Ky.

2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151, 159 (Ky. 2009). Furthermore, "the court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance." *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006) (citing *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)), *overruled on other grounds by Leonard,* 279 S.W.3d at 159.

As with any appeal, a trial court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR[5] 52.01.

[5] Kentucky Rules of Civil Procedure.

III. Guilt Phase Claims[6]

On cross-appeal, Gowans first argues that the trial court erred by holding that his trial counsel provided effective assistance despite the fact that counsel failed to ensure that a biased juror did not sit on the jury at trial. The juror in question previously had witnessed a shooting, and she informed the trial court that she was upset when the shooter was found not guilty despite confessing. Gowans argues that his trial counsel was ineffective when he failed to question the juror further or to challenge her for cause.

RCr 9.36(1) states, in pertinent part: "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Under Kentucky case law, "[a] determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination." *King v. Commonwealth*, 276 S.W.3d 270, 278 (Ky. 2009) (citing *Pendleton v. Commonwealth*, 83 S.W.3d 522, 527 (Ky. 2002)); *Mabe v. Commonwealth*, 884 S.W.2d 668 (Ky. 1994). A juror who, as victim or otherwise, has been personally affected by a crime similar to the crime charged, is not automatically excused. *See Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004) (holding that a juror who had been upset by the murder of her

[6] The guilt phase claims are those raised by Gowans in his cross-appeal, 2008-CA-000948-MR, from the trial court's denial of his RCr 11.42 motion to set aside his conviction. While normally we might address the direct appeal first, we choose to address Gowans' claims first because a criminal trial proceeds from guilt phase to penalty phase.

neighbor/babysitter did not improperly remain on the jury of a murder trial); *see also Whalen v. Commonwealth*, 891 S.W.2d 86, 88-89 (Ky.App. 1995), *overruled in part on other grounds by Moore v. Commonwealth*, 990 S.W.2d 618 (Ky. 1999) (holding that failure to excuse a juror who had been raped by her stepfather was not error in a trial including rape and sodomy charges). The juror in this case was questioned by the trial court about her prior experience. She answered affirmatively that she could listen to the proof for both sides and stated that her experience would not influence her. As such, Gowans has not shown that his counsel's failure to seek to excuse this juror for cause constituted ineffective assistance.

Gowans next argues that the trial court erred by holding that his trial attorney was not ineffective when he failed to object timely to the court's failure to give the jury an instruction pursuant to RCr 9.57 when the jury was initially unable to reach a verdict.[7] He maintains that this error resulted in jury coercion.

RCr 9.57 states that, in the event a jury is unable to reach a verdict, a "court shall not give any instruction regarding the desirability of reaching a verdict" other than one which contains certain elements. Gowans raised this issue

[7] The jury deliberated for four and one-half hours before informing the trial court that it was unable to come to a decision. The trial judge then asked the jury members if they felt that further deliberations would benefit them in resolving the issues and one juror raised her hand. Next, the trial judge asked if anyone thought that further deliberations would *not* benefit them and no one raised their hand. The trial judge then asked the jury to continue deliberating, and to inform the court if, after a reasonable amount of time, they were still unable to reach a verdict. After about ten minutes passed, the jury returned with a verdict of guilty of manslaughter in the first degree.

on direct appeal, claiming palpable error. Rejecting that claim, the Kentucky Supreme Court stated:

> [U]pon learning that the jury is deadlocked and ascertaining that further deliberations may be useful, a trial court is not *required* to instruct the jury as to the desirability of reaching a verdict. Rather than instructing the jury regarding the desirability of a verdict, the trial court in this case merely instructed the jurors to continue their deliberations for a "reasonable period of time." When a trial court makes a statement that does not discuss the desirability of a verdict, the issue is not whether the statement complies with RCr 9.57(1), but whether the statement was coercive.

Gowans, 2005 WL 2316194 at *3 (emphasis in original) (citations omitted). Although the Supreme Court's review is not dispositive due to the differing nature of the claims, its analysis of the merits is persuasive as to Gowans' claim for ineffective assistance of counsel. Upon inquiry by the trial court, the jury indicated that further deliberations would be useful. No judicial error occurred in merely allowing further deliberations or in failing to give the RCr 9.57 instruction regarding the desirability of reaching a verdict. Gowans has failed to show that he was prejudiced by any failure of his trial attorney to make a timely objection.

Gowans next argues that the trial court erred by holding that his trial attorney was not ineffective for failure to move for an instruction on voluntary intoxication. Voluntary intoxication is a defense to a criminal charge when it negates the existence of an element of the offense. KRS 501.080. Gowans argues that, if the jury had been given an instruction as to voluntary intoxication, a reasonable probability exists that the jury would have found that Gowans did not

possess the requisite intent for murder or manslaughter in the first degree. The standard for an intoxication instruction is as follows:

> [E]vidence of intoxication will support a criminal defense only if the evidence is sufficient to support a doubt that the defendant knew what she was doing when the offense was committed. In order to justify an instruction on intoxication, there must be evidence not only that the defendant was drunk, but that she was so drunk that she did not know what she was doing.

Springer v. Commonwealth, 998 S.W.2d 439, 451 (Ky. 1999). Although Gowans and his wife both testified that he had been drinking prior to the shooting, Gowans did not claim in his testimony that he did not know what he was doing. In fact, he testified that he intended to shoot Payne. Gowans' defense was not lack of the requisite intent to murder Payne, but that he acted for self-protection because of Payne's ongoing harassment. As such, an instruction on the defense of intoxication was not warranted and Gowans' attorney's failure to request such an instruction did not constitute deficient performance.

Gowans next argues that the trial court erred when it failed to hold an evidentiary hearing to determine whether trial counsel was ineffective by failing to locate, interview and secure witnesses who would have supported Gowans' defense. Allegations brought under RCr 11.42 are subject to a hearing only when they are not refuted on the face of the record. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky.App. 1986). In his RCr 11.42 motion, Gowans points to two witnesses whom his attorney failed to locate and secure. The record shows that the first witness actually testified at Gowans' trial. The record further shows that trial

counsel stated, during the trial, that he had been continuously unable to locate the other witness. He even moved for a continuance in an effort to continue looking for him. Therefore, the record refutes Gowans' allegations that his trial attorney was deficient by failing to locate and secure these witnesses. Accordingly, the trial court did not err when it failed to hold an evidentiary hearing on this issue.

Gowans' final argument is that the trial court erred by holding that trial counsel was not ineffective despite numerous alleged errors. Gowans proceeds under the theory that although no single error may be sufficient for reversal, reversal is warranted due to the aggregation of errors. To prevail on this argument, Gowans would have had to show that his trial counsel's representation actually contained the errors alleged. Cumulative non-error does not equate to any error whatsoever. As Gowans has failed in this endeavor, no relief is warranted.

IV. Penalty Phase[8]

On direct appeal, the Commonwealth argues that the trial court erred in finding that Gowans received ineffective assistance of counsel during the penalty phase of his trial. Specifically, the Commonwealth argues that the trial court's factual findings are clearly erroneous, that the trial court incorrectly applied the law based on the alleged erroneous findings, and that Gowans failed to show that he was prejudiced by any ineffective assistance of counsel.

[8] As noted, the penalty phase claims are those of the Commonwealth on its direct appeal, 2008-CA-000807-MR, of the trial court's order vacating Gowans' sentence and ordering a new sentencing hearing.

The Commonwealth challenges the following finding in the trial court's order:

> Testimony during the 11.42 hearing indicates there were a number of family members, friends and respected members of the community who could have testified on the [Gowans'] behalf. . . . [T]rial counsel testified he did not investigate potential mitigation witnesses because it is his experience that it does little good and once the jury found guilt on the lesser charge the sentence was a foregone conclusion.

Our review of the RCr 11.42 hearing record reveals that a number of witnesses, in fact, stated that they would have testified at trial on behalf of Gowans' character. Witnesses stated that he was active in his church and community and that he had provided support and assistance to numerous people, including the homeless. Additionally, Gowans' wife testified that she had attempted to present Gowans' trial attorney with a letter from the Salvation Army which commented on Gowans' work in the community.

As recognized by the trial court, Gowans' trial attorney acknowledged he holds a general trial philosophy that mitigation evidence in the penalty phase can do more harm than good. Trial counsel recalled the possible mitigation evidence involved Gowans' work with his church and community service. Counsel, however, also testified that in this specific case, his discussion of mitigation evidence with Gowans included the pros and cons of presenting such evidence. Trial counsel stated that trial strategy during the guilt phase had been to portray the victim to the jury as the "bad guy" who had terrorized Gowans, but that

the history between Gowans and the victim was not one-sided. Trial counsel felt the guilt phase verdict was a "good result" given the evidence and was fearful that calling mitigation witnesses would allow the Commonwealth to present the evidence involving Gowans' prior bad acts, specifically kicking in a door looking for the victim while armed, and putting a gun to a person's head. Trial counsel stated he "didn't want to talk about that any more than necessary." While Gowans argues that this evidence had already been introduced in the guilt phase, trial counsel's statement is not inconsistent with Gowans' position. Trial counsel's testimony distinguishes this case from one in which trial counsel relied only on a personal trial philosophy when deciding not to call mitigation witnesses.

Under the first part of the *Strickland* test, pertaining to whether trial counsel's performance was deficient, the strategic decisions of counsel are not the basis of relief under RCr 11.42. *Parrish v. Commonwealth*, 272 S.W.3d 161, 170 (Ky. 2008) (stating that "an RCr 11.42 motion is not an exercise in second-guessing counsel's trial strategy[]"); *Sanders*, 89 S.W.3d at 390 (noting that "[t]he decision as to whether or not to call family members as mitigation witnesses is a strategic one which will not be second-guessed by hindsight"); *Harper v. Commonwealth*, 978 S.W.2d 311, 317 (Ky. 1998) (holding that "[o]n review, as a court far removed from the passion and grit of the courtroom, we must be especially careful not to second-guess or condemn in hindsight the decision of defense counsel.[9] A defense attorney must enjoy great discretion in trying a case,

[9] We note that Gowans' trial was presided over by a judge who had retired by the time Gowans filed his RCr 11.42 motion. Thus, that motion was heard by a judge who had not presided at

especially with regard to trial strategy and tactics[]"). Based on trial counsel's testimony, we conclude that the trial court's findings and conclusion that trial counsel was ineffective in the penalty phase due to his failure to call mitigation witnesses were clearly erroneous, and must be vacated.

In addition, even if Gowans had established that trial counsel's performance was deficient, our view is that Gowans failed to satisfy the second aspect of the *Strickland* test, *i.e.*, whether a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Slaughter v. Parker*, 450 F.3d 224, 234 (6th Cir. 2006) (holding that notwithstanding counsel's deficient performance in investigating and preparing for the penalty phase of trial, defendant failed to show reasonable probability that result would have been different). As noted, a reviewing court must review the entirety of the proceedings before the trial court in making this determination. *Simmons*, 191 S.W.3d at 561.

In this case, Gowans admitted that he had shot and killed the victim. The jury, as discussed above, was initially unable to reach a verdict and did so only after inquiry by the trial court. During the penalty phase, not only did Gowans' counsel argue for the minimum, but the Commonwealth asserted that although the minimum sentence was inappropriate, Gowans' lack of a lengthy violent record indicated that he was "not the guy who should get the maximum." Notwithstanding this statement, the jury deliberated for less than five minutes

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trial.

during the penalty phase before recommending the maximum of twenty years. The effect of the mitigation evidence of the sort proposed by Gowans on his sentence is purely speculative. *See Slaughter*, 450 F.3d at 235. When the entire record of Gowans' trial is examined, the trial court clearly erred by determining, after the evidentiary hearing, that "there is a reasonable probability that had mitigation evidence been introduced, or at least evaluated, the result of the sentencing proceeding would have been different."

V. Conclusion.

The Fayette Circuit Court's order with respect to the guilt phase of the trial is affirmed. The Fayette Circuit Court's order vacating Gowans' sentence and ordering a new sentencing hearing is hereby vacated. This matter is remanded to that court with direction to deny Gowans' RCr 11.42 motion for a new sentencing hearing.

NICKELL, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent with respect to the majority opinion addressing the penalty phase of Gowans' trial.

The majority concludes that the trial court erred in finding that Gowans received ineffective assistance of counsel during the penalty phase of his trial. Specifically, it contends that the trial court's factual findings are clearly

erroneous, that the trial court incorrectly applied the law based on the alleged erroneous findings, and that Gowans failed to show that he was prejudiced by any ineffective assistance of counsel.

With respect to the trial court's findings of fact, I first observe that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. The majority has quoted, but unduly circumscribed, the trial court's actual findings of fact. Rather than the brief quotation appearing in the majority opinion, the entirety of the trial court's findings with respect to the penalty phase is as follows:

> The second area Movant complains of is trial counsel's failure to call mitigation witnesses during the sentencing phase of the trial. Testimony during the 11.42 hearing indicates there were a number of family members, friends and respected members of the community who could have testified on the Movant's behalf. This may have been offset by the Movant's prior criminal record, however, trial counsel testified that he did not investigate potential mitigation witnesses because it is his experience that it does little good and once the jury found guilt on the lesser charge the sentence was a foregone conclusion. The problem with this approach is that it does not involve a strategy based upon specific case information but is a presumption based upon general experience. This Court finds that trial counsel's decision was not trial strategy based upon information obtained. As such there is a reasonable probability that had mitigation evidence been introduced, or at least evaluated, the result of the sentencing proceeding would have been different.

My review of the RCr 11.42 hearing record reveals that indeed there were a number of witnesses who stated that they would have testified at trial on

behalf of Gowans' character. Witnesses stated that he was active in his church and community and that he had provided support and assistance to numerous people, including the homeless. Additionally, Gowans' wife testified that she had attempted to present Gowans' trial attorney with a letter from the Salvation Army which commented on Gowans' work in the community. I conclude that as the trial court's findings are supported by the evidence, they are not clearly erroneous.

At the RCr 11.42 hearing, Gowans' trial attorney testified that he personally felt that mitigation evidence could do more harm than good. Based on this testimony, and deferring to the trial judge on determinations of fact and credibility, there was substantial evidence to support the conclusion that the trial attorney omitted mitigation evidence of his own accord. Accordingly, I believe that the trial court's findings in this regard are not clearly erroneous.

The trial court clearly believed, and I agree, that trial counsel's decision to forego presenting mitigation evidence at the penalty phase should be based on an individual analysis of the case. Counsel may not discharge his duty to investigate, analyze and consider presentation of mitigation evidence simply upon his general belief or personal experiences that such evidence does no good and may be harmful. Certainly such a view is not universally held, and counsel may not meet his obligation of effectiveness simply by relying on his generalized personal trial philosophy. Personal views cannot be repackaged as trial strategy. Visceral reactions are not enough.

Finally, the Commonwealth argues that even if Gowans' trial attorney was ineffective, Gowans failed to show prejudice. It relies on *Strickland v. Washington, supra*, for the view that:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S.Ct. at 2052. There was evidence that multiple witnesses were willing to testify as to Gowans' good character and other respectable attributes and the trial court so found. I am not persuaded that the trial court erred when it concluded that "there is a reasonable probability that had mitigation evidence been introduced, or at least evaluated, the result of the sentencing would have been different." Furthermore, as observed by the trial court, failure to consider the value of such evidence is sufficient to undermine confidence in the outcome of the sentencing phase. Accordingly, that portion of the March 31, 2008, order vacating the sentence imposed should be affirmed.

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